

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 19 August 2016

BALCA Case No.: 2016-TLN-00060
ETA Case Nos.: H-400-16152-667215

In the Matter of:

**ERICKSON CONSTRUCTION,
dba ERICKSON FRAMING AZ LLC,**

Employer.

Appearances: Reed Graham
Chief Operating Officer
Erickson Construction
Chandler, AZ
For the Employer

Jeffrey L. Nesvet
Vincent C. Costantino
U.S. Department of Labor
Office of the Solicitor of Labor
Employment and Training Legal Services
Washington, District of Columbia
For the Certifying Officer

Before: **CARRIE BLAND**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to the Employer’s request for review of the Certifying Officer’s denial in the above-captioned H-2B temporary labor certification matter. The H-2B program permits employers to hire foreign workers to perform temporary, nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security, “if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor.” 8 C.F.R. §214.2(h)(1)(ii)(D); *see also* 8 U.S.C.

§1101(a)(15)(H)(ii)(b); 8 C.F.R. §214.2(h)(6)(ii)(B); 20 C.F.R. §655.6(b).¹ Employers who seek to hire foreign workers under this program must apply for and receive a “labor certification” from the U.S. Department of Labor (“DOL”). 8 C.F.R. §214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a Certifying Officer (“CO”) of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”). 20 C.F.R. §655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. §655.33(a).

BACKGROUND

On May 31, 2016, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Erickson Construction (“Employer”). AF 129 – 160.² Employer requested certification for 20 “Helpers-Carpenters” from August 14, 2016 until November 30, 2016. AF 129. Employer indicated that the nature of its temporary need was a peakload need, and explained that:

Our peakload is defined by the new residence home production. The Holidays, weather conditions and shorter days are factors that slow the new home production. Generally, after the Holidays are over and the good weather returns, the potential home-buyers get out looking and buying new single family homes. Home-Buyer Contracts that are signed in January get loan approvals, home-builders pull the permits, and the start of the peak-load for single family home building begins and ramps up.

AF 149.

On June 7, 2016, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”) notifying Employer that its application did not comply with the requirements of the H-2B program. AF 124 – 128. The CO identified a “failure to establish the job opportunity as temporary in nature” and requested further information and documentation to demonstrate Employer’s temporary peakload need. Specifically, the CO requested that Employer provide:

1. Summarized monthly payroll reports for a minimum of three previous calendar years that identified, for each month and separately for full-time

¹ All citations to 20 C.F.R. Part 655, Subpart A refer to the Final Rule promulgated in 2008 (“2008 Rule”), 73 Fed. Reg. 78020 (Dec. 19, 2008), as amended by the Interim Final Rule (“2013 IFR”) promulgated in 2013, 78 Fed. Reg. 24047 (Apr. 24, 2013), since the Department has postponed its implementation of the Final Rules promulgated in January 2011, 76 Fed. Reg. 3452 (Jan. 19, 2011) (“2011 Wage Rule”) and February 2012, 77 Fed. Reg. 10038 (Feb. 21, 2012) (“2012 Rule”). See 79 Fed. Reg. 11450,11453 (Mar. 5, 2014) (announcing that until such time as the Department finalizes a new wage methodology, the current wage methodology contained in 20 C.F.R. § 655.10(b), as set by the 2013 IFR, will remain unchanged and continue in effect); 78 Fed. Reg. 53643 (Aug. 30, 2013) (indefinitely delaying effective date of 2011 amendment); *Bayou Lawn & Landscape Services v. Solis*, Case 3:12-cv-00183-MCR-CJK, Order at 8 (ND FL Apr. 26, 2012) (enjoining DOL from implementing or enforcing the 2012 Rule), affirmed by *Bayou Lawn & Landscape Services v. Secretary of Labor*, 713 F.3d 1080 (11th Cir. 2013); 77 Fed. Reg. 28764 (May 16, 2012) (announcing “the continuing effectiveness of the 2008 H-2B Rule until such time as further judicial or other action suspends or otherwise nullifies the order in the *Bayou II* litigation”).

² References to the 160-page appeal file will be abbreviated with an “AF” followed by the page number.

- permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation was to be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system;
2. Annualized and/or multi-year work contracts or work agreements from calendar years 2014 to 2015 of the employer's work.; and
 3. A letter of explanation with accompanying milestone schedule for the employers requested period of intended employment that distinguished how the employer determined it would require this period of intended employment to complete the work discussed over the previous period it agreed to in its initial contract.
 4. Other evidence and documentation that similarly served to justify the requested dates of need.

AF 128.

On June 22, 2016, Employer responded to the NOD, including in its response an amended statement of temporary need; summarized monthly payroll documents for the years 2013 to 2015; multiple subcontractor agreements; and a 2016 contract work schedule. AF 18 – 122. In its amended statement of temporary need, Employer explained:

We are basing our need for temporary workers on the need for the duties to be performed by the temporary additions during our peakload months and not on the “inability to recruit” young construction workers. The inability to recruit construction workers hinders our ability to pick up more work and keep up with the increased demand during our peakload.

The job itinerary reflects our contractual milestones. The total number of homes framed are displayed on the bottom of the report, January through May are completed milestones. The projected numbers have not been completed. This report will also reflect the full 2016 year. The increased demand for our services reflects the new home construction peakload, as shown in our total framed units. . . .

. . .

I would like to state that our peakload is not seasonal or Holiday based. The Holidays are a factor as to why people, in general, do not buy new homes [sic]. The Holidays is one of 2 events which marks the decrease in the demand for our services. The increase in contracts during our peakload months is a reflection of new home purchases, which need to be constructed. As shown above [referencing monthly United States Census Bureau data regarding Building Permits] this is a recurring trend year after year.

AF 52 – 53.

After reviewing the documentation that Employer submitted in response to the NOD, the CO concluded that Employer failed to overcome the deficiency and establish a peakload need for the positions in the application. AF 2 – 17. The CO explained that the payroll documents “suggest a clear pattern of fluctuation which indicates the employer's business ‘peaks’ based on the amount of contracts it currently has with contractors and builders, and not based on the holiday season.” AF 7. Furthermore, the agreements provided by the Employer do not include execution dates or end dates. AF 8. The CO stated that the 2016 contract work schedule indicated that November actually had fewer projects than June, July, April, and May, which were not included in the alleged peakload period. *Id.* The payroll documents also reflected fewer staff members in the alleged peakload months in 2015 than in off-peak months. *Id.* Consequently, on July 18, 2016, the CO issued a final determination denying the requested certification. AF 2 – 17.

On July 27, 2016, Employer requested administrative review of the denial. AF 1. In its request, Employer clarified that:

In our statement of need, it is informed that "Our date of need is April 1 to December 15 each year, but due to that we are filing our petition late and in order to comply with the regulation to file 75 days before the start date of need, our date of need only for this petition is from August 16 to December 15" and that April, May, June and July are in our period of need.

Id.

On August 8, 2016, pursuant to 20 C.F.R. § 655.61(c), I issued a Notice of Assignment and Expedited Briefing Schedule, granting the parties seven business days from receipt of the appeal file to file briefs with this office. The Employer did not submit a brief. On August 15, 2016, counsel for the CO, however, filed a brief with this Office. In its brief, the CO submits that, based on the information submitted by the Employer in the AF, the Employer's business does not have an established peak or need for additional labor as alleged. The CO points to the Employer's failure to provide annualized or multi-year contracts or work agreements from calendar years 2014 to 2015, as requested in the NOD. Brief at 5. The CO also refers to the lack of specific production schedules on the contracted worksites. *Id.* at 6. The CO submits that the documentation provided by Employer does not support its alleged peakload need, as “payroll data demonstrates a large permanent workforce for all three years submitted, 2013, 2014, and 2015, and no temporary workers,” indicating that the Employer was “able to fulfill its contractual requirements without the need for temporary workers.” *Id.* at 7. The CO further submits that “no data was presented to show a change in circumstances for the current period of need that reflects an increase in work.” *Id.* In essence, the CO argues that the Employer failed to establish an increase in contractual requirements during the dates of need that would support a finding of temporary, peakload need for an additional 20 Helpers – Carpenters.

DISCUSSION

Pursuant to DHS regulations, temporary labor consists of any job in which the employer's need for the duties to be performed by the workers is temporary, regardless of whether the underlying job can be described as permanent or temporary. 8 C.F.R. § 214.2(h)(6)(ii)(A). Employment is of a temporary nature when the employer will need the services or labor only for a limited period of time. 8 C.F.R. § 214.2(h)(6)(ii)(B). Accordingly, an employer must establish that its need for the services or labor "will end in the near, definable future." *Id.* Generally, that period of time will be limited to one year or less, but in the case of a one-time event the period could last up to three years. *Id.*

In order to obtain certification, the petitioning employer must demonstrate that its need for the services or labor identified in the application qualifies as a temporary need under one of the following four standards: a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B). To qualify under the peakload standard of temporary need, the employer "must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation." 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

In the present case, Employer aims to satisfy the peakload standard for temporary need by presenting evidence of contracts it has been awarded; permanent staff that it has employed over the years of 2013 to 2015; and projected number of homes to be framed per month in 2016. Employer argues that this evidence demonstrates patterns in new home production, which drives contracts awarded to Employer, which in turn creates a peakload need for Helpers-Carpenters between the months of August and November. I find that the evidence presented by the Employer fails to support this assertion.

First, while the payroll data provided by the Employer demonstrates that Employer regularly employs permanent workers to perform the "Field Only" services in Reno, Nevada, the payroll records do not demonstrate a consistent need to supplement this permanent staff during the period of August through November. *See* AF 48 – 50. As the CO found, Employer has seemingly met its entire labor needs over the past three years with permanent staff. Employer has not presented evidence to suggest that the number of workers required during the alleged period of need differs from or exceeds the number required in past years. While the Employer cites to U.S Census data that demonstrate an increase in building permits during the Employer's purported period of need, this falls short of specifically demonstrating Employer's need for temporary workers.

Second, the contracts provided do not provide sufficient information to demonstrate Employer's need to supplement its permanent staff. The contracts do not present schedules or execution dates within the Employer's period of need,³ nor do they present evidence to suggest that the scope of work is outside of the ability of Employer's current workforce. In fact, the

³While Employer does provide a graph of projected contractual milestones, *see* AF 52, this information is not reflected in the contracts provided to the CO.

contracts appear to have been signed in 2012 and 2013, and according to the provided payroll information, Employer did not require temporary labor in 2013. Moreover, given that the projected contractual milestones suggest that more houses were to be framed in April and May than are to be framed in November, there is no evidence to suggest that Employer has not been able to meet its contractual obligations with its current workforce.

Third, that the payroll data indicates a significant overall growth in the number of permanent staff employed by Employer between 2013 and 2015. Without additional information or explanation on the part of the Employer, it is not clear that any temporary additions to staff will not become a part of the Employer's regular operation. It is the Employer's burden to establish why the job opportunity and number of workers being requested reflect a temporary need within the meaning of the H-2B program. The Employer has failed to present evidence sufficient to demonstrate that need.

In light of the foregoing, the record does not justify the Employer's purported peakload temporary need. Accordingly, the CO's denial of certification is hereby AFFIRMED.

SO ORDERED.

For the Board:

CARRIE BLAND
Administrative Law Judge

Washington, D.C.